constitutional text in light of "history, practice, precedent, and the structure of the Constitution"); *United States* v. *Classic*, 313 U.S. 299, 316 (1941) ("If we remember that 'it is a Constitution we are expounding,' we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the Constitutional purpose.") (citation omitted); *Bell* v. *Maryland*, 378 U.S. 226, 288-289 (1964) (Goldberg, J., concurring) ("Our sworn duty to construe the Constitution requires * * * that we read it to effectuate the intent and purposes of the Framers."); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 418-419 (1819) (declining to attribute a "strict and rigorous meaning" to the "necessary and proper" clause that would have conflicted with "the intention of the convention" that framed the Constitution). In particular, they demonstrate that the Framers would not have intended to preclude appointment of a Member of Congress to an Executive Branch position without regard to whether she actually benefits from an increase in compensation that occurred during her congressional term.

The first version of what would become the Ineligibility Clause, set out in the Virginia Plan's fourth and fifth resolutions at the Constitutional Convention, would have categorically barred Members of Congress from holding other federal office during and for some period following their term of election. 1 *The Records of the Federal Convention of 1787*, at 20-21 (Max Farrand ed., 1911) (*Records*). That proposal reflected the desire to "shut the door against corruption," lest Members of Congress "make or multiply offices, in order to fill them." *Id.* at 380.

A counter-proposal offered by Nathaniel Ghorum of Massachusetts would have eliminated the Ineligibility

Clause altogether, out of concern that a bar on the appointment of Members of Congress to other offices would limit the number of capable persons who could serve in government. 1 *Records* 375-376. James Wilson, a delegate from Pennsylvania and an original Member of this Court, opposed the measure on the basis that it would "disqualify a good man from office," *id.* at 379, when "we ought to hold forth every honorable inducement for men of abilities to enter the service of the public," *id.* at 380. Alexander Hamilton, expressing the view that the interests of government would be positively served by the appointment of Senators and Representatives to high office, declared himself to be "against all exclusions and refinements, except only in this case; that when a member takes his seat, he should vacate every other office." *Id.* at 382; see 2 *Records* 286 (Gouverneur Morris was "ag[ainst] rendering the members of the Legislature ineligible to offices. He was for rendering them eligible ag[ain] after having vacated their Seats by accepting office."); *id.* at 283-284 ("Mr. Pinkney argued that * * * making the members ineligible to offices was * * * improper as their election into the Legislature implied that they had the confidence of the people; that it was *inconvenient*, because the Senate might be supposed to contain the fittest men[;] * * * that it was *impolitic*, because the Legislature would cease to be a magnet to the first talents and abilities.")

James Madison argued for a "middle ground between an eligibility in all cases, and an absolute disqualification." 1 *Records* 388. As Madison explained:

> Some gentlemen give too much weight and others too little to this subject. If you have no exclusive clause, there may be danger of creating offices or augmenting the stipends of those already created, in order to

> gratify some members if they were not excluded. Such an instance has fallen within my own observation. I am therefore of opinion, that no office ought to be open to a member, which may be created or augmented while he is in the legislature.

Id. at 380. In Madison's view, "the unnecessary creation of offices, and increase of salaries, were the evils most experienced," so "if the door was shut ag[ainst] them, it might properly be left open for the appoint[ment] of members to other offices as an encouragm[ent] to the Legislative service." *Id.* at 386. Like Hamilton, Madison was of the view that "an absolute disqualification" based on legislative service "would be an objection with the most capable citizens." *Id.* at 389.

The Constitutional Convention thus sought to avoid a temptation to legislate the creation of unnecessary offices or to increase executive salaries in order to "gratify" Members who might then gain appointment. At the same time, the Convention sought to avoid a regime that would broadly disqualify Members of Congress from appointment to executive office. Those dual purposes are served if a Member of Congress does not become the beneficiary of an increase in emoluments for an Executive Branch office that took effect but was then rescinded during her Congressional term. In light of the customary (indeed automatic, see 5 U.S.C. 5303(a)) nature of cost-of-living salary adjustments, the construction advocated by appellant would risk creating the categorical bar from Executive Branch service that the Convention rejected—especially for Senators given their six-year terms.

The historical practice of the political Branches reinforces this understanding. On at least seven occasions since the Civil War, Congress has rolled back the salary

of an office, and a Member of Congress has been nominated and confirmed to a position that the Ineligibility Clause otherwise would have barred him or her from assuming. In 1876, Senator Lot Morrell was nominated and confirmed as Secretary of the Treasury following the rollback of the annual salary for that office, which, during his Senate term, had been raised from $8000 to $10,000 and then returned to $8000. See 119 Cong. Rec. 38,317 (1973).

In 1909, Congress reduced the salary of the Secretary of State so that Senator Philander Knox could be appointed to the office. During Knox's term in the Senate, Congress had raised the annual salary of cabinet positions from $8000 to $12,000. Act of Feb. 26, 1907, ch. 1635, 34 Stat. 948. After President Taft expressed an intention to nominate Knox, legislation was introduced in Congress to reduce the salary of the Secretary of State to $8000. See Act of Mar. 4, 1909, ch. 297, 35 Stat. 861. After a vigorous debate over the meaning of the Ineligibility Clause, the view that Knox was constitutionally eligible to serve at the lower salary prevailed. 43 Cong. Rec. 2390-2415 (1909); *id.* at 2205 (Senate); *id.* at 2415 (House). Knox was confirmed unanimously. 44 Cong. Rec. 6-7 (1909).

In 1973, President Nixon expressed his intent to nominate Senator William Saxbe to be Attorney General. 119 Cong. Rec. at 38,316. During Saxbe's Senate term, the annual salary of the Attorney General had increased from $35,000 to $60,000. *Id.* at 38,317. The President sought legislation to reduce the salary to $35,000, which Senator Robert Byrd opposed on the ground that it would be insufficient to satisfy the Ineligibility Clause. See *Hearing Before the Comm. on the Judiciary on S. 2673*, 93d Cong., 1st Sess. (1973) (*1973*

Judiciary Comm. Hearing); 119 Cong. Rec. at 37,017-37,026; see also *id.* at 38,315-38,348 (Senate debate); *id.* at 39,234-39,245 (House debate). After debate of the Ineligibility Clause issue, Congress passed the legislation by overwhelming majorities. See *id.* at 39,245 (House); *id.* at 38,347-38,348 (Senate). The Senate confirmed Saxbe by a 75-10 vote. *Id.* at 42,018.

In 1975, when President Ford appointed Representative Robert Casey to a seat on the Federal Maritime Commission, Congress passed legislation that reduced the salary of Casey's seat, but not the other Commission seats, for the duration of Casey's congressional term. Act of Dec. 31, 1975, Pub. L. No. 94-195, 89 Stat. 1108; 121 Cong. Rec. 40,811 (1975). Casey was confirmed by voice vote with recorded opposition from only Senator Byrd. *Id.* at 42,158.

By 1980, even Senator Byrd apparently had come to accept the view that rolling back the salary of an office would prevent triggering the restrictions of the Ineligibility Clause. That year, President Carter appointed Senator Edmund Muskie to be Secretary of State. Legislation reduced the Secretary of State's salary to the level at which it had been prior to Muskie's existing Senate term. See Act of May 3, 1980, Pub. L. No. 96-241, 94 Stat. 343. The Senate confirmed Muskie with 94 votes, including that of Senator Byrd. 126 Cong. Rec. 10,279 (1980); see *id.* at 10,272-10,273 (statement of Sen. Byrd) ("[T]he State Department's gain is the Senate's loss. What matters is that the Nation continues to benefit from the services of Ed Muskie."). Only two Senators opposed Muskie's confirmation, and neither appeared to be motivated by Ineligibility Clause concerns, since both previously had voted in favor of confirming Saxbe. *Id.* at 10,279; see 119 Cong. Rec. at 42,018.

In 1993, President Clinton nominated Senator Lloyd Bentsen to be Secretary of Treasury, and Congress passed legislation reducing the salary of the Secretary to the level at which it had been at the beginning of Bentsen's term. See Act of Jan. 19, 1993, Pub. L. No. 103-2, 107 Stat. 4. Bentsen was confirmed as Secretary of the Treasury without opposition. 139 Cong. Rec. 388-389 (1993).[6]

In addition to the precedent set by Presidents Grant, Taft, Nixon, Ford, Carter, Clinton, and Obama of appointing one or more Members of Congress to Executive office under circumstances similar to the ones here, the Department of Justice has on numerous occasions en-

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[6] Contrary to appellant's suggestion (J.S. 32-34), the delays in the appointments of William Paterson to the Supreme Court and of Samuel Kirkwood to the post of tariff commissioner had nothing to do with the issue presented by this case. Those nominations were to newly created offices, not to offices whose emoluments had increased. See 119 Cong. Rec. at 38,316 (noting that Paterson's nomination was withdrawn "on the ground that [he] was a member of the Senate when the law creating that Office was passed") (internal quotation marks and citation omitted); 17 Op. Att'y Gen. 365 (1882) (noting that Kirkwood "was elected and qualified as Senator * * * for a term which would expire in March, 1883," and that "[s]ince then, by act of May 15, 1882, chapter 145, the office of tariff commissioner was created: *Advised* that the second clause of section 6 of the first article of the Constitution disqualifies K. for appointment to such office"). Those examples are thus covered by the other sub-part of the Ineligibility Clause barring appointment to offices "which shall have been created" during a Member's term. U.S. Const. Art. I, § 6, Cl. 2.

Appellant's reliance (J.S. 34-35) on the example of Senator Matthew Ransom's nomination is equally inapposite. In Ransom's case, Congress had raised the salary of the office to which he had been appointed and taken no action to repeal the increase. See 21 Op. Att'y Gen. 211, 214 (1895). The emoluments of the office thus were indisputably higher at the time of Ransom's nomination than at the beginning of his Senate term. *Ibid.*

dorsed the efficacy of legislation reducing the salary of an office as a means of complying with the Ineligibility Clause. Assistant Attorney General Charles Russell took this position with respect to the prospective appointment of Senator Knox, see 43 Cong. Rec. at 2402-2403, as did Acting Attorney General Robert Bork and Assistant Attorney General for OLC Robert G. Dixon with respect to the prospective appointment of Senator Saxbe, see S. Rep. No. 499, 93d Cong., 1st Sess. 5-7 (1973); *Hearing Before the Comm. on Post Office and Civil Service on S. 2673*, 93d Cong., 1st Sess. 8-16 (1973); *1973 Judiciary Comm. Hearing* 69-74. See also 3 Op. Off. Legal Counsel 298, 300 (1979) (Opinion 79-54); 3 Op. Off. Legal Counsel 286, 289-290 (1979) (Opinion 79-51).

As appellant points out (J.S. 29-30), Assistant Attorney General for OLC Charles Cooper reached the opposite conclusion in an unpublished 1987 memorandum. See *2009 OLC Op.* attachment (Memorandum for the Counselor to the Att'y Gen. from Charles J. Cooper, Asst. Att'y Gen., OLC, *Ineligibility of Sitting Congressman to Assume a Vacancy on the Supreme Court* (Aug. 24, 1987)). OLC has since concluded, however, that the 1987 opinion "was not in accord with the prior interpretations of [the Ineligibility] Clause by the Department of Justice" and does not "reflect[] the best reading of the Ineligibility Clause." *2009 OLC Op.* 1. After an extensive analysis of the text, original understanding, and purposes of the Clause, as well as the subsequent practice in applying it, OLC's conclusion is "that, where a salary increase for an office would otherwise create a bar to appointment of a member of Congress under the Ineligibility Clause, compliance with the Clause can be

achieved by legislation rolling back the salary of the executive office before the appointment." *Id.* at 14.

2. That is precisely what has happened here. Section 1(a) of the Emoluments Act fixes the Secretary's "compensation and other emoluments" at the level in effect before Secretary Clinton began her last term as a Senator. 122 Stat. 5036. On January 21, 2009, Senator Clinton was confirmed as Secretary of State by a 94-2 vote, and neither opposing Senator cited the Ineligibility Clause as a basis for his vote. See 155 Cong. Rec. S693 (daily ed. 2009).

The Emoluments Act addresses the concerns animating the enactment of the Ineligibility Clause (see pp. 19-21, *supra*) by ensuring that the compensation for the office of Secretary of State cannot be greater than when Secretary Clinton began her most recent Senate term. Contrary to appellant's suggestion (J.S. 21-23), the issue is not whether Congress has authority to "fix" a violation of the Ineligibility Clause. Rather, by rescinding an increase in the salary for the Secretary's office, the Emoluments Act prevents a violation of the Clause in the first place.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction in this Court. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

ELENA KAGAN
Solicitor General

TONY WEST
Assistant Attorney General

NEAL K. KATYAL
Deputy Solicitor General

PRATIK A. SHAH
Assistant to the Solicitor General

MARK B. STERN
ANISHA S. DASGUPTA
Attorneys

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No. 09-797

In The
Supreme Court of the United States

DAVID C. RODEARMEL, *Appellant*,

v.

HILLARY RODHAM CLINTON, *et al.*, *Appellees*.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

PAUL J. ORFANEDES
Counsel of Record
JAMES F. PETERSON
JUDICIAL WATCH, INC.
501 SCHOOL STREET
SUITE 700
WASHINGTON, D.C. 20024
(202) 646-5172

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

This case presents substantial issues, and neither summary dismissal nor affirmance is appropriate. Congress provided for mandatory, expedited review in this Court so that these issues can be heard. As demonstrated in Plaintiff's jurisdictional statement ("J.S."), this appeal was properly taken from a three-judge court order and probable jurisdiction should be noted.

I. THIS COURT HAS JURISDICTION.

This case is properly before this Court because Congress specifically provided for mandatory and expedited review. Pub. L. 110-455, 122 Stat. 5036 (codified at 5 U.S.C. § 5312 note) ("Joint Resolution"). Congress was unequivocal in directing that the Court "shall" accept jurisdiction, "advance the appeal on the docket," and "expedite the appeal." *Id.* at § 3(B).

Defendants claim that the Court should decline to hear this case because the three-judge court did not reach the merits of Plaintiff's claim under the Ineligibility Clause. Motion to Dismiss or Affirm ("Defs.' Mot.") at 5-6. This case is unique, however, in that Congress specifically directed that the weighty issues raised in this case be accorded prompt and direct review by this Court. *Cf.* 28 U.S.C. § 1253 (containing no such expedited consideration).

Defendants do not dispute that the Court has the authority to grant discretionary review of the order of the three-judge court. The questions raised

concerning the proper interpretation of the Ineligibility Clause, and who has standing to raise them, were fully briefed and argued below, and again set forth in Defendants' brief to this Court. A three-judge court below already has fully heard the issues. Granting review at this time is the only way to comply with Congress' clear intent for prompt review.

Moreover, Plaintiff's standing, derived from *Board of Education v. Allen*, 392 U.S. 236 (1968), is intertwined with the substantial question raised regarding the proper interpretation of U.S. Const., art. I, § 6, cl. 2 (the "Ineligibility Clause"). Plaintiff's oath-based standing is directly related to the harm he has suffered as a result of being required to serve under, take direction from, and report to a constitutionally ineligible superior. It is entirely appropriate to address these interrelated issues now, as Congress intended.[1] At the end of the day, Congress placed appellate review directly in this Court for precisely a case like this one.

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[1] In the event that the Court declines to hear this case at this time, the practice of the Court is to vacate the order of the district court and remand the case to that court, so that a new order may be entered, in order that Plaintiff may take a timely appeal to the circuit court of appeals. *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (vacating order of district court to allow timely appeal); *Mengelkoch v. Industrial Welfare Comm'n*, 393 U.S. 84, 84 (1968) (same).

II. THE MOTION FOR SUMMARY AFFIRMANCE SHOULD BE DENIED.

A. Plaintiff Has Demonstrated Standing.

Defendants assert Plaintiff lacks standing because of the "abstract nature" of his injury and that he has not been "aggrieved" by an action of the Secretary of State. Defs.' Mot. at 8-17. Like the district court, Defendants fundamentally misconstrue the nature of Plaintiff's allegations demonstrating standing and the nature of this Court's clear precedent.

It is undisputed, and Defendants do not try to dispute, that "oath of office" standing is a viable and entirely sufficient basis for establishing standing, as demonstrated by *Board of Education v. Allen*, 392 U.S. 236 (1968). Strikingly, Defendants make only a cursory attempt to distinguish *Allen*, asserting that Plaintiff lacks the necessary "personal stake" to establish standing. Defs.' Mot. at 13-14. Plaintiff's injury, however, is more distinctly personal, and even more compelling than the injuries suffered by the board members in *Allen*. The officials in *Allen* had no property right to their elected, public office. *Taylor v. Beckham*, 178 U.S. 548 (1900). By contrast, foreign service officers such as Plaintiff clearly enjoy a property right in their continued federal employment. *Colm v. Vance*, 567 F.2d 1125, 1129, n.3 (D.C. Cir. 1977). Mrs. Clinton's appointment and continuance in office, which places Plaintiff in the untenable position of violating his oath of office or facing possible

disciplinary action, including removal, for insubordination or other, related grounds, constitutes a material, adverse change in Plaintiff's continuing federal employment and causes injury to his property interest in that employment. Such a dilemma is far more than mere "psychic harm" as suggested by Defendants. Defs.' Mot. at 13.

Moreover, Plaintiff has standing as he has been "aggrieved by an action of the Secretary of State," specifically being required to serve under, take direction from, and report to Mrs. Clinton. Plaintiff is a U.S. Foreign Service Officer, appointed by the President with the advice and consent of the Senate, and thus an "Officer of the United States," a position to which is delegated a portion, albeit small, of the sovereign powers of the United States. 31 Op. O.L.C. ___ (2007); 2007 OLC LEXIS 3, **12-74 (April 16, 2007). Being required to serve under, take direction from, and report to a constitutionally ineligible superior certainly diminishes the office to which an "Officer of the United States" has been appointed, if not the sovereign power of the United States that has been delegated to that officer. Under Defendants' cribbed theory of standing, however, not even an "Officer of the United States" can maintain a challenge to a violation of the Constitution that affects his or her own office, which is the injury Plaintiff seeks to remedy here.

Hence, oath-based standing under *Allen* is a more than sufficient basis for Plaintiff to maintain this action. Contrary to Defendants' claim, Plaintiff's

standing in this case is not based on a "generally available grievance about government" (Defs.' Mot. at 9-11), but rather a direct, personal, and concrete injury. Plaintiff's injury is nothing like the generalized harm alleged by the reservists in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974). In *Schlesinger*, a group of reservists opposed to the Vietnam War sought to prevent Members of Congress from serving in the Armed Forces Reserves, citing the Incompatibility Clause. The reservists argued that membership in the Armed Forces Reserves by Members of Congress "deprives or may deprive the individual and all other citizens and taxpayers of the United States of the faithful discharge by [M]embers of Congress who are members of the Reserves of their duties as [M]embers of Congress, to which all citizens and taxpayers are entitled." *Schlesinger*, 418 U.S. at 212. The Court found the reservists lacked standing:

> The very language of respondents' complaint . . . reveals that it is nothing more than a matter of speculation whether the claimed nonobserveance of that Clause deprives citizens of the faithful discharge of the legislative duties of reservist Members of Congress. And that claimed nonobservance, standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury.

Id. at 217. Again, Plaintiff has alleged far more than a mere generalized injury common to all citizens or simply taxpayer standing. He has alleged direct injury to the oath he took as a U.S. Foreign Service Officer and an Officer of the United States, as well as fundamental, material, and adverse changes to the terms and conditions of his employment at the Department of State. Defendants' reliance on *Ex Parte Levitt*, 302 U.S. 633 (1937) is similarly inapt because, as Plaintiff previously explained, Plaintiff's relationship to the Secretary of State is not at all analogous to a member of the Supreme Court bar and a justice of this Court. *See* Defs.' Mot. at 11; J.S. at 18-19.

Defendants wander particularly far afield in their reliance on *Raines v. Byrd*, 521 U.S. 811 (1997), and their superficial analogy that, because oath-takers in *Raines* (and *Levitt*) did not have standing, then oath-based standing is unavailable to Plaintiff. Oath-based standing, however, was never even asserted or ruled upon in *Raines*. 521 U.S. at 819-27. Moreover, unlike the legislators in *Raines*, Plaintiff has a far more "personal stake in the outcome" of this challenge, as the requirement to serve under, take direction from, and report to a constitutionally ineligible superior impairs his effectiveness as a U.S. Foreign Service Officer and Officer of the United States. This requirement to serve under a constitutionally ineligible superior is in direct conflict with Plaintiff's oath. This is the concrete, personal injury that, under *Allen*, provides standing in the case.

The continuing viability of oath-based standing, in a case in which Congress has mandated review of the appointment of a constitutionally ineligible member of Congress, presents a substantial question.

B. Mrs. Clinton's Appointment is Contrary to the Plain Language of the Ineligibility Clause.

As demonstrated in the Jurisdictional Statement, and fully briefed and argued below, the emoluments of the office of the Secretary of State increased during the Senate term to which Mrs. Clinton was elected (January 2007 through January 2013). It is undisputed that this increase rendered Mrs. Clinton ineligible for appointment to any "civil office under the Authority of the United States" under Art. I, sec. 6, cl. 2.

The substantial question underlying this case is whether a subsequent legislative "fix" by Congress restored Mrs. Clinton's constitutional eligibility for office. Notably, Defendants offer no explanation as to why, if Framers had intended to allow for such a legislative remedy, no such provision exists. As discussed in the Jurisdictional Statement, the Framers plainly knew how to provide for Congress to make "exceptions" and allow Congress to remove otherwise strict Constitutional prohibitions. *See* J.S. at 25-26. The Ineligibility Clause, in striking contrast, does not provide for any such legislative "fixes" to cure a Member's ineligibility.

A plain language application of the Ineligibility Clause is entirely proper and also consistent with the purposes underlying the Clause. In response, Defendants only offer an extra-textual interpretation of the Ineligibility Clause, claiming that the words "on net" should be read into the otherwise unambiguous language of the provision. Defs.' Mot. at 17-18. Defendants identify no ambiguity in the plain language of the Ineligibility Clause to justify such a modification.

In any event, as explained in detail in the Jurisdictional Statement, a plain language interpretation of the Ineligibility Clause is reinforced by the purposes underlying the provision. Notable by its absence from the historical record of the Constitution, as well as from Defendants' brief, is any support for an "on net" theory of constitutional interpretation. Also missing is any historical evidence in support of the proposition that the Framers contemplated that a legislator's eligibility could be restored via legislative "fix."

Furthermore, it is indisputable that the Ineligibility Clause is the product of a carefully balanced compromise between advocates of no restriction on legislators holding office and those who favored a total prohibition. While Federalists such as Alexander Hamilton generally opposed any limitation on holding office (J.S. at 26-29), advocates of ineligibility for office, including numerous prominent Anti-Federalists, believed that a prohibition was essential to maintain separation between the branches

(J.S. at 27) and to limit the growth of the national government (*Id.* at 28). The primary concerns of proponents of ineligibility, therefore, were broad and intended to affect the behavior of the legislature as a whole. Temporarily decreasing the salary of an office actually undermines the purpose behind the Clause.

As Plaintiff previously discussed (J.S. at 30-31), and unresponded to by Defendants, a legislative "fix" by which eligibility can be restored at any point for any office effectively removes any incentive for legislators not to pursue such offices at the "expense of their constituents" or increase the size of government. The Anti-Federalists particularly feared the emergence of a "permanent political class" which would want to increase the power and size of the central government by taxing the nation. *See* John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFSTRA L. REV. 89, 158-61 (1995). If federal offices are available without any limitation, this promotes legislators becoming part of a permanent political class and becoming detached from their local communities. *Id.* Only if the Ineligibility Clause is interpreted consistent with its plain language, by disqualifying Members from holding these offices, are the broad purposes behind the Ineligibility Clause given full effect.

Finally, it is undisputed that until relatively recently, the Ineligibility Clause was readily understood and applied consistent with its plain language. In fact, the earliest application of the Ineligibility Clause – and most contemporaneous with

the framing of the Constitution – involved a nomination by President Washington that clearly demonstrated an adherence to a plain language interpretation of the Clause. J.S. at 32.

The historical examples cited by Plaintiff, and that Defendant attempts to distinguish, demonstrate that until relatively recently the Ineligibility Clause was readily understood and applied consistent with its plain language. J.S. at 32-35. For example, the opinion of U.S. Attorney General Benjamin Harris Brewster in 1882 (relied on by the 1987 OLC Opinion) found nothing ambiguous about the Ineligibility Clause and no need to review its purposes. 17 Op. Att'y Gen. 365 (1882).

Defendants are correct that deviation from the plain language of the Ineligibility Clause began with the nomination of Senator Philander Knox in 1909, continued with the nomination of William Saxbe as Attorney General in 1973, and now the appointment at issue here. The critical point, however, is that no number of violations of the Ineligibility Clause by the political branches can excuse further violations.

Hence, historical practice does not justify an "on net" interpretation of the Ineligibility Clause or any legislative "fix" to restore a legislator's eligibility. On the contrary, the historical practice indicates that the plain language of the Ineligibility Clause has been readily understood, but at times circumvented, for

personal expediency by the political branches.[2] Prior violations of the Ineligibility Clause, however, provide no principled justification for further disregard.

The expanding use of legislative "fixes" to evade the plain language of a provision of the Constitution is a question worthy of review by this Court. The question presented, the proper interpretation of the Ineligibility Clause and workability of a "legislative fix," is substantial and should be set for plenary consideration by this Court.

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[2] Surprisingly, the Office of Legal Counsel's longstanding legal advice on this issue apparently was altered for purposes of this specific litigation. Defs.' Mot. at 18, 25-26 (citing Mem. Op. For the Att'y Gen. from David J. Barron, Acting Asst. Att'y Gen., OLC, U.S. Dep't of Justice, *Validity of Statutory Rollback as a Means of Complying with the Ineligibility Clause* (May 20, 2009). The same day Defendants submitted their opposition in this case before the district court, OLC issued this self-serving opinion, presumably at the request of Defendants, so that Defendants could include it in their submission. This occurred despite that the Office of Legal Counsel's internal policy had been that "[a]s a prudential matter, OLC should avoid opining on questions likely to be at issue in pending or imminent litigation involving the United States as a party (except where there is a need to resolve a dispute within the Executive Branch over a position to be taken in litigation). *See Memorandum for Attorneys of the Office Re: Best Practices for OLC Opinions*, by Principal Deputy Assistant Attorney General Steven G. Bradbury (May 16, 2005). Hence, as a prudential matter, OLC's "newly minted" legal opinion should not be given any weight.

CONCLUSION

Probable jurisdiction should be noted and consideration of the appeal expedited in accordance with Congress' wishes. In the event that the Court declines to hear this case at this time, Plaintiff respectfully requests that the Court vacate the order of the district court and remand the case to that court, so that a new order may be entered, in order that Plaintiff may take a timely appeal to the circuit court of appeals.

Respectfully submitted,

PAUL J. ORFANEDES
Counsel of Record
JAMES F. PETERSON
JUDICIAL WATCH, INC.
501 SCHOOL STREET
SUITE 700
WASHINGTON, D.C. 20024
(202) 646-5172
Counsel for Appellant

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